

STATE OF MICHIGAN
COURT OF APPEALS

MADELINE ROMANEK and R. LAWRENCE
ROMANEK,

UNPUBLISHED
December 2, 2003

Plaintiffs-Appellants,

v

JOHN G. GIRARDOT, M.D., RICHARD L.
LAM, M.D., and SURGICAL ASSOCIATES OF
SOUTHWEST MICHIGAN, PC,

No. 242301
Calhoun Circuit Court
LC No. 01-001106-NH

Defendants-Appellees.

Before: Cooper, P.J., and Markey and Meter, JJ.

MEMORANDUM.

Plaintiffs appeal by right the trial court's order granting defendants' motion for summary disposition and dismissing the case without prejudice. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs filed suit alleging that defendants committed medical malpractice in treating an infection that developed after a surgery. Plaintiffs filed an affidavit of merit signed by a board-certified family physician, who stated that defendants violated the applicable standard of care.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that plaintiffs' affidavit of merit was defective because it was not signed by a specialist practicing in the same specialty, as required by MCL 600.2169(1)(a). The trial court granted defendants' motion and dismissed the case without prejudice, relying on *Kirkaldy v Rim*, 251 Mich App 570; 651 NW2d 80 (2002).

A medical malpractice plaintiff must file with the complaint an affidavit of merit signed by a health professional who meets or who the plaintiff's attorney reasonably believes meets certain statutory requirements. MCL 600.2912d. An expert witness cannot testify against a defendant who is a specialist unless the expert practices or teaches in the same specialty as the defendant. MCL 600.2169(1). If the defendant is board-certified in a specialty, the expert witness must be board-certified in the same specialty. MCL 600.2169(1)(a). Dismissal of a case without prejudice is the proper remedy for the filing of a defective or inadequate affidavit, as opposed to the total failure to file any affidavit. *Kirkaldy, supra*, 583-585.

Plaintiffs' affidavit of merit from a board-certified family physician did not comply with MCL 600.2169(1)(a). In *Kirkaldy, supra*, the plaintiffs filed an affidavit from a physician who was board-certified in a specialty different from that practiced by the defendants. The *Kirkaldy* Court acknowledged that while the affidavit was technically deficient, it appeared that the affiant had adequate knowledge, skill, and training so that his proffered testimony would eliminate the possibility that the plaintiffs' claim was frivolous. Nevertheless, the *Kirkaldy* Court held that the trial court properly concluded that dismissal without prejudice was the proper sanction for the plaintiffs' nonconforming affidavit. *Kirkaldy, supra*, 584-585.

We reject plaintiffs' assertion that the trial court should have denied defendants' motion for the reason that defendants' affidavits of meritorious defense were defective. Plaintiffs have not identified any authority that precludes a defendant physician from signing the required affidavit of merit.

We affirm.

/s/ Jessica R. Cooper

/s/ Jane E. Markey

/s/ Patrick M. Meter